THE EXTENT AND EVILS OF DOUBLE TAXATION IN THE UNITED STATES

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Double taxation of the same property right is deemed to be inherently unfair and is specifically forbidden by the fundamental law of some states; and it may be said in general terms to be contrary to sound principles of taxation. To a certain extent the citizen is protected against double taxation caused by the arbitrary exercise of the taxing power, not only through the fundamental law of his own state, but also the Constitution of the United States. Nevertheless, it may be said that double taxation prevails to a greater extent in the United States than in any other part of the civilized world. This is primarily owing to the complexity of our system of government, whereunder the citizen and his property are subject to the taxing power of two distinct sovereignties, the state and the United States, and to the general ignoring of interstate comity in the exercise of the taxing power by the states over the persons and property within their own jurisdiction.

In the exercise by a state of its power of taxation over persons and property within its jurisdiction, there is double taxation, to a certain extent, in the popular, if not the legal, sense of the term; and this is the more frequent in the now admitted failure of the general property tax as an effective taxing system. Thus, the state may tax property and the income from the property. It may tax a stock of merchandise and the right to use that merchandise in conducting a business. A man may be taxed upon property and also be compelled to pay assessments for public improvements on the theory of the betterment of his property from the improvements, which may and may not exist in fact. There is another form of double taxation of the same value, though to different owners, in the taxation of land and the mortgage upon the land, though the existence of the mortgage reduces by so much the value of the land. These cases the law does not consider double taxation in the legal sense, that is, the duplicate taxation of the same property right.

As a rule, however, direct double taxation is sought to be avoided in the administration of the taxing laws of the states; and it has been repeatedly declared by the courts that it is never presumed, though it has been broadly stated that in the absence of constitutional restraints the power of the state to tax the same property twice is said to be the same as the power to tax once. That is, there is no federal constitutional question raised by the exercise of such a power where there is no arbitrary discrimination between those of the same class. Thus, in the universal adoption of corporate organizations it is recognized that the holders of corporate shares should not be taxed by the state, when the corporate property is taxed by the same state. On the other hand, in the case of mortgage taxation, it is also clear that there is no new property value created by the mortgage, but there has been in effect a division of the property value between the mortgagee and the mortgagor. This has been recognized in California and Oregon by a system of taxing the separate interests of the mortgagee and the mortgagor; and in the supreme court of the United States this system has been held to be valid under the Constitution of the United States (Savings Society *v.* Multnomah, 169 U. S. 421), where the court said that there was nothing taxed but the real estate mortgaged, the interest of the mortgagor therein being taxed to him and the rest to the mortgagee, and that in this there was no double taxation.

The statement in the opinion that there was no double taxation applied only to the case before the court, that is, where the statute of Oregon under consideration expressly exempted the mortgagee from taxation upon the note secured by the mortgage; but there was nothing to prevent another state, where the holder of such a mortgage note was domiciled, from taxing him thereon; and this latter form of taxation, that is, upon holders of notes secured by mortgages in other states, has been sustained by the supreme court as not violative of due process of law (Kirtland *v.* Hotchkiss, 100 U. S. 491). The practical difficulty which has prevented the general adoption of this California and Oregon plan of taxing mortgages is found in the impossibility of preventing the practical evasion of the tax upon the mortgagee, by enforced assumption of such tax by the mortgagor as a condition of the loan.

The ineffectiveness of the general property tax, in so far as intangible personal property is concerned, which is dependent

upon the disclosure by the tax payer of his possessions, is too notorious to require extended discussion. This ineffectiveness necessarily applies to the attempted taxation of mortgage notes as personal property, with the exception of the estates of widows and orphans in the probate court and of trustees who do not care to evade for the benefit of their beneficiaries. Such taxation of mortgage notes and other intangible personalty is practically repudiated by the public, so that the tax as a rule is only paid by those who are not able to evade.

The only remedy for double taxation of this kind in the state taxing laws is in the substitution of an effective taxing system for an ineffective one, thus recognizing the fundamental principle in taxation that effectiveness, and not equality, should be the primary aim. As has been well said, an effective system of taxation which cannot be evaded will tend to bring about equality, while a tax levied without regard to effectiveness, though ostensibly equal, may result in the grossest kind of inequality. This is illustrated by the success of the so-called mortgage recording tax in New York and other states resulting in a largely increased public revenue and in the successful application of the principle of classification in the registration of securities for taxation.

Double taxation is necessarily involved in the exercise of the taxing power by the independent sovereignties of the states and the United States. Thus, the enlarged taxing power given to Congress is illustrated by the new income tax law, and the new war tax will also involve double taxation in the taxation of forms of property which are taxed under state laws. This form of double taxation is the necessary result of our complex form of government, wherein the person and property of the citizen are subject to the exercise of the taxing power by the sovereignties of both state and nation.

There is another form of double taxation, however, which is not the necessary result of our complex governmental system, but is directly caused by the ignoring by the states of the fundamental principle of interstate comity in the exercise of their taxing power. Thus there is a widely diffused double taxation resulting from the subjection of the same property value to the taxing powers of different states, as where the owner of property is domiciled in one state and the property is located in another, or where the property

is in one state and the paper evidence of the property is in another, or in case of inheritance or succession taxation where the decedent is domiciled in one state and the property located in another, or the legatee is resident in still another.

Thus, it was forcibly said by one of our most eminent economists, Professor Seligman:

> It need not be pointed out, that amid the complexities of modern industrial life equality taxation cannot be attained without a careful consideration of these problems. Today a man may live in one state, may own property in a second, and carry on a business in a third. He may die in one place and leave all his property in another. He may spend all his income in one town and may derive that income from property or business in another. He may carry on business in several states, or if he has invested in corporate securities, the corporation may be the creature of another state, or be situated to do business in a third. All these cases may affect foreign states or separate commonwealths of the same federal state, or separate cities or counties of the same commonwealth. The possible entanglements are well-nigh innumerable.

The due process of law and the equal protection of the laws guaranteed by the federal Constitution do not enforce interstate comity in state taxation except to a very limited degree. The jurisdiction of a state in taxation, as in other matters, is limited to its own territory. It can tax, however, not only the property located within its territory, but also the persons domiciled there; and if it can reach or discover the same, it can tax the intangible personalty of those domiciled within its jurisdiction wherever located, and it can also tax the business that is carried on within its jurisdiction, irrespective of the domicile of the owners of the business. The real difficulty in the application of the principle of interstate comity is in the fact that the jurisdiction of the state for taxing purposes extends, not only over property and business within its borders, but also over the persons domiciled therein. It may disregard the fiction that personal property has a situs at the residence of the owner, and may tax all property even including notes, bonds and the like, belonging to non-residents when they have acquired what is deemed an independent situs in the state. The only limitation upon this comprehensive power which is incident to sovereignty over the persons domiciled, the business conducted, and the property located within the jurisdiction, is that this does not extend to tangible personal property any more

than it does to real estate which is located within the jurisdiction of another state. This limitation was declared by the supreme court in Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, but the court said that this case did not involve the question of taxation of intangible personal property or of inheritance or succession taxes which are controlled by different considerations.

A familiar case of double taxation resulting from the ignoring of interstate comity is that of shares of stock or bonds of a foreign corporation, or bonds of another state which are assets in the hands of a citizen taxable by the state wherein he is domiciled. Such securities are taxable as a rule, not because they are specifically mentioned in the tax law, but because they are included in the property which the individual citizen is required by law to return for taxation. Some states specifically require the enumeration of such property. This ignoring of interstate comity in the taxation of corporate and other securities is the more to be deplored as the commercial relations of our people are not controlled by state lines, and corporate securities both stocks and bonds are freely invested in by our people irrespective of whether the corporation is organized under the laws of the same state or not. Comparatively few of our states have sought to base this question of the taxation of corporate and other securities upon sound, economic and just principles not limited to state lines. Some states have recognized a retaliatory principle in their tax legislation by providing for the exemption of resident stockholders as to their holdings of the stock of non-resident corporations, when the laws of the state of the incorporation provided a like exemption for those domiciled in that state.

In Kidd *v.* Alabama, 188 U. S. 730, it was said that:

> No doubt it would be of great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with the others, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided, but the constitution of the United States did not go so far, and a state was not bound to make its laws harmonious in principles with those of other states.

The consequences of this general disregard of interstate comity in taxation are very much controlled by the now generally recognized ineffectiveness of the system of general property taxation, so far as the taxation of intangible property, interstate as well as

state, is concerned, where it rests entirely upon disclosure by the individual tax payer of his securities. Statutes subjecting intangible property, such as stocks, bonds, and other evidences of indebtedness, to taxation, have been found essentially unenforceable, as it is practically impossible to enforce from tax payers the disclosure for taxation of such property located or secured in other jurisdictions.

There is another form of double taxation through the ignoring of interstate comity which is not capable of evasion, and that is in the state inheritance tax laws. A state may not only impose a tax upon an inheritance of property of decedents domiciled in such state, but may also tax the property located in its territory, which passes under the inheritance law of any other state. The decedent may have been domiciled in one state, and his property may be located in another, or he may own stock in a corporation of another state, while the heir, legatee or devisee may live in a third jurisdiction.

It was directly ruled by the supreme court in Blackstone *v.* Miller, 188 U. S. 189, that interstate comity was not enforced by the federal Constitution to prevent duplicate taxation under inheritance tax laws of different states upon the same estate. Thus, in this case it was held that the imposition of a tax under the New York inheritance tax law on the transfer, under the will of a citizen of Illinois, of debts due the deceased by residents of that state, did not violate the fourteenth amendment, although the entire estate was taxable in the state of Illinois.

The supreme court of New York said in such a case that:

"It was unfortunate that the laws of the different states relating to succession taxation were not uniform and framed to prevent double taxation."

This subject was carefully considered by the National Conference on Taxation, held at Buffalo, New York, May 23, 1901, under the auspices of the National Civic Federation, attended by representatives both economists and men of large practical experience in taxation appointed by governors of some thirty states. The conference unanimously adopted the following resolution, after full discussion, as expressive of its views:

WHEREAS, Modern industry has overstepped the bounds of any one state, and commercial interests are no longer confined to merely local interests, and,

WHEREAS, The problem of just taxation cannot be solved without considering the mutual relations of contiguous states, be it

Resolved, That this conference recommend to the states the recognition and enforcement of the principles of interstate comity in taxation. These principles require that the same property should not be taxed at the same time by two state jurisdictions, and to this end that if the title deeds or other paper evidences of the ownership of property, or of an interest in property are taxed, they shall be taxed at the situs of the property, and not elsewhere. These principles should also be applied to any tax upon the transfer of property in expectation of death, or by will, or under the laws regulating the distribution of property in case of intestacy.

Not only interstate but international comity is required under modern conditions to protect the taxpayer from double taxation. The world is growing smaller and investments are limited neither by state nor national boundaries. In a suit brought by a California bank to recover taxes alleged to have been illegally levied, the supreme court said (104 U. S. 111) that all subjects over which the jurisdiction of the state extends are objects of taxation. The court said that it assumed that the foreign investments of the bank were such as were usual in a bank's business and had their legal situs at its domicile; but the court did not consider what would be the rule, if the investments were in fixed property subject exclusively to another jurisdiction.

Double taxation of the same property to the same owner, whether resulting from a disregard of interstate or international comity, is alike repugnant to economic justice, and is condemned by the universal law of mankind, the *jus gentium* of the civilians, which was said to be common to all nations, because resting on the nature of things, and the general sense of equity which obtains among all men.